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IN THE

Supreme Court of the United States

October Term—1952

No. 185

SETH M. MILLIKEN,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN W. BURKE, JR.,
Counsel for Petitioner.

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Seth M. Milliken, the petitioner, respectfully moves for leave to file the annexed petition for rehearing of the order of this Court entered November 17, 1952, denying the petition for writ of certiorari in this case. Rehearing is now sought because, as pointed out more fully in the annexed petition, the decision of this Court in *Arrowsmith et al.* v. *Commissioner of Internal Revenue,* —— U. S. ——, November 10, 1952, is in conflict with the decision of the Court of Appeals for the Second Circuit in this case on one of the questions presented, and on the other question presented the decision of the Court of Appeals herein raises problems of the scope and extent of the rule just set forth in the *Arrowsmith* case, *supra.*

JOHN W. BURKE, JR.,
Counsel for Petitioner.

Petition for Rehearing on Petition for Writ of Certiorari

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Seth M. Milliken, hereby respectfully petitions this Honorable Court for a rehearing of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that court herein, which petition for certiorari was denied by this Court on November 18, 1952.

Statement Under Rule 33

The basis for jurisdiction, questions presented, statutes involved, statement of facts and reasons for granting the writ are set forth in the original petition for writ of certiorari herein.

Pursuant to Rule 33, this petition for rehearing is respectfully submitted on the ground that the decision of this Court in *Arrowsmith et al.* v. *Commissioner of Internal Revenue,* —— U. S. —— (November 12, 1952, Docket No. 51), constitutes an intervening occurrence of controlling effect on the second question presented herein. That question is, as set forth in the original petition herein:

> Was it not error for the Court of Appeals to hold petitioner should be taxed as short term, not long term, capital gain the $58,372.44 he received in 1942 (in three payments) for certain rights and assets he had previously obtained in exchange for corporate stock of Cotwool Manufacturing Corporation which he had owned for many years?

The decision of this Court in *Arrowsmith et al.* v. *Commissioner of Internal Revenue, supra,* is also of substan-

tial effect on the other question presented in the original petition herein, and for the purpose of clarifying an important and basic question in the administration of Federal income tax law, this Court should consider and determine the scope of the rule of the *Arrowsmith* case as applied to this question:

> Was it not error for the Court of Appeals to hold that petitioner could only deduct as a capital loss, not an ordinary loss or expense, $33,411.29 he paid in 1942 in settlement of transferee liability asserted against him because in 1941 he had received assets of the dissolved Ellingwood Corporation in exchange for its corporate stock?

Reasons for Granting the Writ

1. In 1942 petitioner realized gains by using the rights he had obtained in an exchange which had occurred in a prior tax year. At the time of the prior exchange these rights had no ascertainable fair market value. At the time of the earlier exchange the petitioner had held the assets which he then exchanged, for many years, so that his gain was a long term capital gain. The question presented is whether the petitioner's additional receipts in 1942 are to be characterized, taxwise, as part of the exchange which had been previously only partly consummated. The United States Court of Appeals held herein that these gains were not to be so characterized. The petitioner contended below, and herein, that they should be so characterized. The decision of this Court in *Arrowsmith et al.* v. *Commissioner of Internal Revenue, supra,* holds that when a loss results from an exchange* which occurred in a prior year, the de-

* In that case, the exchange was a shareholder's exchange of his stock in a corporation for a pro rata share of the corporate assets.

ductibility of the loss must, for tax purposes, be characterized by the nature of the earlier exchange. The opinion of the Court in the *Arrowsmith* case is in all respects just as applicable to subsequent gains as it is to subsequent losses.

Since this Court has just held that subsequent losses are to be taxed as capital losses in these circumstances, so it should now hold that these gains should be taxed as long term capital gains.

The decision of the United States Court of Appeals herein refusing to characterize petitioner's gains in the light of the prior exchange can only be upheld if this Court wishes to limit the apparent scope of its reasoning in the *Arrowsmith* case. Although we know of no reason for such a limitation on the rule just announced by this Court, if there is to be any such limitation it should be announced by this Court to avoid utter confusion in the administration of the Federal income tax law.

2. If the rule of the *Arrowsmith* case requires any delimitation and clarification, this Court should provide the clarification. The other issue presented in this case provides an ideal opportunity for this type of clarification. In 1941 petitioner herein, as a shareholder of Ellingwood Corporation, received his pro rata share of its assets in the complete liquidation and dissolution of that corporation. Subsequently, in 1942 tax deficiencies were asserted against Ellingwood, which were not anticipated at the time of the liquidation, and which were compromised and settled by petitioner as transferee. The United States Court of Appeals below held, that even though the 1941 liquidation was apparently closed, assuming that the tax deficiencies were not then foreseeable, the petitioner's later payment of these taxes constituted a capital loss. In the *Arrowsmith* case,

in which this Court reached the same conclusion, the liability subsequently paid by Arrowsmith was one which the taxpayer knew about at the time the corporation was liquidated. This Court held that the fruition of that foreseeable liability should be taxed in the same way as the original loss on the liquidation, that is, as a capital loss. As indicated in the dissenting opinion in the *Arrowsmith* case, this raises some question as to the scope of this new rule which replaces the previously accepted rule of numerous Tax Court decisions.

It would seem that a transaction which is apparently closed to all effects and purposes (as in the present case) need not be reopened in a later year even though transactions, which are recognized as incomplete because of pending litigation (as in the *Arrowsmith* case) will be held open.

In any event, by now deciding this question on the merits, this Court can avoid the doubts and conflicts referred to in the dissenting opinion in the *Arrowsmith* case.

WHEREFORE your petitioner respectfully prays for a rehearing on the application for certiorari and that a writ of certiorari be issued directed to the United States Court of Appeals for the Second Circuit in respect of its decision and judgment, modifying the determination of the United States Tax Court, for a review thereof by this Court, and for such other relief as to this Court may seem proper.

Dated: New York, New York, November 28, 1952.

SETH M. MILLIKEN,
Petitioner,

By JOHN W. BURKE, JR.,
Attorney for Petitioner.

Certificate of Counsel

I hereby certify that I have examined the foregoing petition for a rehearing; it is presented in good faith and not for delay; in my opinion it is well founded, the cause is one in which the petition should be granted, and this petition is restricted to the grounds specified in Rule 33.

Dated: November 28, 1952.

JOHN W. BURKE, JR.,
Attorney for Petitioner.